

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.562 of 2014

Arising Out of PS.Case No. -128 Year- 2013 Thana -AJAMNAGAR District- KATIHAR

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Sawal Karmakar @ Sabal Karmakar Son of Feku Karmakar @ Bhupal Karmakar,
Resident of Village - Harlagga, Police Station - Azamnagar Salmari, O.P., District-
Katihar. Appellant.

Versus

The State of Bihar Respondent.

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Appearance :

For the Appellant/s : Mr. Bimal Kumar, Adv.
Ms. Maruti Kumari, Adv.
For the Respondent/s : Mr. Bipin Kumar, A.P.P

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT

Date: 10-10-2017

Heard learned counsel for the appellant and learned
A.P.P. for the State.

2. This criminal appeal has been filed against the
judgment and order of conviction dated 04.08.2014 and order of
sentence dated 12.08.2014 passed by the Additional District &
Sessions Judge-I-cum-Special Judge, Katihar in Sessions Trial
No.430 of 2013, arising out of Azamnagar P.S. Case No.128 of
2013, whereby the learned trial Court convicted the accused Sawal
Karmakar for the offence punishable under Section 4 and 6 of the
Protection of Children from Sexual Offences Act, 2012 (hereinafter
in short referred to as the 'POCSO Act') and sentenced him to
undergo rigorous imprisonment for 10 years for the offence
punishable under Section 4 of the POCSO Act and further
sentenced him to undergo rigorous imprisonment for 10 years



under Section 6 of POCSO Act. Both the sentences were directed to run concurrently.

3. The factual matrix of the case is that Azamnagar P.S. Case No.128 of 2013 was initially instituted under Section 307 & 376 of the Indian Penal Code and subsequently added Section 4 and 6 of the POCSO Act against the accused Sawal Karmakar, on the basis of written report of one Lakhi Devi, wife of Mangal Sah, resident of village Harlagga, P.S. Azamnagar Salmari O.P., District Katihar with the allegation in succinct that on 16.06.2013 at around 6:30 PM when she was cooking food, Lakhi Kumari, the daughter of Bablu Karmakar came and took her daughter Jyoti Kumari aged about 5-6 years to play with her. When she did not regress to her house by 8:30 PM, she started searching her. During course of search, she witnessed her daughter stepping out from the house of Sawal Karmakar weeping in nude condition and on quizzing her about reason of weeping, she divulged that Sawal Karmakar took her to the bamboo cluster and committed rape against her. Thereafter, he took her near the ditch and made her to take dip in the ditch water several times. After divulging the said occurrence, her daughter fell senseless in her lap. She found blood oozing from her private part. Then, she rushed to the house of Sawal Karmakar making hulla. Responding hulla villagers rushed there and seeing



the congregation of the villagers Sawal Karmakar left the scene rapping expletive. Alam alias Bhutu divulged her that he had listened the screaming sound from near the bamboo cluster. He rushed there and took her daughter out of water and grilled her about her presence there. She has claimed that the accused Sawal Karmakar committed rape against her daughter and tried to eliminate her in order to cause the evidence of the commission of the occurrence to disappear.

4. The aforesaid case was investigated by the police and on conclusion of the investigation and finding the case true, the I.O. submitted chargesheet under Section 307 & 376 of the Indian Penal Code and Section 4 and 6 of the POCSO Act against the accused Sawal Karmakar.

5. After receiving the chargesheet and case diary and perusing the same, the learned 1st Additional Sessions Judge, Katihar took cognizance of the offence.

6. The charge against the accused was framed under Section 376 & 307 of the Indian Penal Code and Section 4 & 6 of the POCSO Act. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

7. To substantiate its case in ocular evidence, the prosecution has examined altogether 13 witnesses, namely, Md.



Samrul as P.W.1, Bhuto Sah as P.W.2, Sony Devi as P.W.3, Dr. D.N. Poddar as P.W.4, Rustam Ali as P.W.5, Md. Mahboob Alam as P.W.6, Abul Nasar as P.W.7, Mehsul Alam @ Bhuttu as P.W.8, Md. Shakil as P.W.9, Dr. Lakshmi Sen as P.W.10, Lakhi Devi (informant) as P.W.11, Sanjeev Kumar (I.O.) as P.W.12 and Jyoti Kumari (victim) as P.W.13. In documentary evidence, the prosecution has filed several documents.

8. The statement of the accused was recorded under Section 313 Cr.P.C. The case of the defence is complete denial of occurrence claiming himself to be innocent. In buttress of his case, the accused has also examined three witnesses, namely, Urmila Devi as D.W.1, Sripati Yadav as D.W.2 and Prabhash Yadav as D.W.3.

9. After hearing the parties and perusing the record, the learned trial Court passed the impugned judgment and order of conviction and sentence as detailed in earlier paragraph.

10. Being aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence, the convict has filed this appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubt or not.



12. It is submitted by learned counsel for the appellant that all the witnesses examined by the prosecution are hearsay witnesses of committing rape against the victim by the appellant as they have not seen the aforesaid occurrence. Though the informant in her written report has stated that she had witnessed the victim coming out of the house of the appellant in nude condition but neither the informant in her examination-in-chief nor any other witness have supported the aforesaid case of the prosecution. Though some of the witnesses have stated that they have seen the victim stained in blood and some of the witnesses have stated that they have seen the blood oozing from the private part of the victim but that is not the conclusive proof of occurrence of committing rape against the victim by the appellant as the victim in her cross-examination has stated that in course of taking mango she fell down & sustained injury from the wood. It is further submitted by learned counsel for the appellant that though the doctor, who has examined the victim, has found injury on the private part of the victim and in his cross-examination he has stated that such injury is not possible by fall on the pointed wood or by fingering but the victim herself has not supported the occurrence of committing rape against her by the appellant rather virtually denied the same, hence the aforesaid medical evidence standing against



the ocular evidence of the victim is of no use and is not going to extend any help to the prosecution. It is further submitted that though the doctor has reported finding of dead spermatozoa in the private part of the victim but she has not stated the basis of giving such finding as no pathological test report is on record and moreover as the victim was made to take dip in the ditch water finding of any semen in the private part of the victim is not possible. It is further submitted that as per the statement of the victim itself there was animosity between the parent of the victim and the appellant and the appellant has been falsely implicated in this case out of the aforesaid animosity. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case against the appellant and the appellant is entitled to get benefit of doubt and be acquitted from the charges levelled against him.

13. On the other hand, it is submitted by learned A.P.P. for the State that the prosecution witnesses examined by the prosecution have supported the occurrence of finding the victim stained with blood and some of them have seen the blood oozing from the private part of the victim. The informant has also supported the prosecution case and the victim too in her examination-in-chief has supported the prosecution case by divulging the committing of rape against her by the appellant by



thrusting some hard substance in her private part. The aforesaid ocular evidence also stands corroborated by the medical evidence as the doctor has found the offence of sex committed against the victim and mark of injury on her private part. The learned lower Court correctly appreciating the facts and evidence available on record has passed the impugned judgment and order of conviction and sentence which is liable to be upheld and this appeal has no substance in it and is liable to be dismissed.

14. From perusal of the F.I.R., it appears that it is the case of the prosecution that at the time and date of occurrence Lakhi Kumari took the daughter of the informant, namely, Jyoti Kumari aged about 5-6 years to play with her and when her daughter did not regress to her house even after two hours, the informant made search for her and during the course of search she witnessed her daughter coming out of the house of the appellant Sawal Karmakar in nude condition and weeping. On quizzing about her predicament, she divulged her that Sawal Karmakar taking her to the bamboo cluster committed rape against her. Then he took her to the ditch and made her to take dip in the ditch water in order to eliminate her several times to cause the evidence of the commission of the occurrence to disappear. She also found the blood oozing from the private part of her daughter. The informant



has been examined in this case as P.W.11. From perusal of the examination-in-chief of the informant, it appears that she has not stated about finding her daughter nude while stepping out of the house of the appellant. She has simply stated that when her daughter did not regress to her house she started searching her. During the course of search, she witnessed her daughter stepping out of the house of Sawal Karmakar smeared with mud and blood was oozing from her private part.

15. The victim Jyoti Kumari has been examined as P.W.13. In her examination-in-chief, she has not supported the occurrence of committing rape against her by the appellant by thrusting his private part into her private part rather she has stated that the appellant Sawal Karmakar had thrust some hard substance into her private part and made her to take dip in the river. She has also not supported the statement of the informant regarding stepping out of the house of the appellant Sawal Karmakar in nude condition. Moreover, though in her examination-in-chief, she has stated that some hard substance was thrust in her private part by the appellant but completely resiling and backtracking from her aforesaid statement, in cross-examination she has stated that she had gone to eat mango along with Lakhi Kumari and she fell down during the course of taking mango & sustained injury from wood.



Meaning thereby that she had sustained injury in her private part due to falling on the wood. She has also stated that the appellant has been falsely implicated due to dispute between him and her parent. Thus, she appears to have completely demolished her examination-in-chief and also the prosecution case.

16. P.W.8-Mehsul Alam @ Bhuttu has stated in his examination-in-chief that at the time of occurrence he was regressing to his house from the market. He arrived at the place of occurrence responding screaming of the victim and witnessed accused Sawal Karmakar absconding in the torch light. In the meantime, the mother of the victim and her family members arrived there. He found the blood oozing from her private part. He has not witnessed the occurrence of committing rape against the victim by the appellant. Moreover, in quite contradiction to the prosecution case, he has stated that he had found victim at place of occurrence. He witnessed the accused Sawal Karmakar escaping from the place of occurrence. Thus, he has also not supported the prosecution case regarding stepping out of the victim from the house of the appellant Sawal Karmakar in nude condition.

17. From perusal of testimony of P.W.5, P.W.6 and P.W.9, it appears that the said witnesses have stated that the victim was stained with blood, whereas P.W.7 and P.W.8 have stated that



the blood was oozing from the private part of the victim but mere finding the victim stained with the blood and oozing of the blood from her private part, in my considered opinion, is not conclusive proof of committing rape against the victim in view of the aforesaid statement of victim about sustaining injury from wood on falling on it. P.Ws.1, 2, 3, 5, 6, 7 & 8 do not happen to be the eye witness of committing rape against the victim rather they are hearsay witnesses. P.Ws.1, 2, 3, 5, 6, 7, 8 and informant Lakhi Devi have stated in their respective examination-in-chief that the victim had divulged the occurrence of committing rape against her by the appellant but P.W.13, the victim has not corroborated the factum of divulgence of the occurrence to them. Hence, for want of corroboration by the victim, the evidence of the aforesaid hearsay witnesses is not admissible. P.W.9 also does not happen to be eye witness of the occurrence rather the hearsay witness. Thus, from perusal of the aforesaid ocular evidence of the prosecution, it appears that the prosecution has utterly and miserably failed to substantiate its case by adding consistent, reliable, trustworthy and cogent ocular evidence.

18. From perusal of the statement of doctor, who had examined the victim, it appears that he has stated that the victim got injury on her private part due to forcible rape with her. In the



pathological test report dead spermatozoa was found in the private part of the victim. Thus, there is definite sign of forcible rape against the victim. In his cross-examination, the doctor has stated that such injury is not possible by pointed wood or by fingering but the aforesaid medical evidence stands in quite contradiction to the statement of the prosecutor as the prosecutrix has herself stated that she had fallen during taking mango and sustained injury from wood. Moreover, the doctor appears to have given its opinion regarding committing rape against victim also on the basis of finding dead spermatozoa in her private part on the basis of pathological test but no pathological test report has been brought on record by the prosecution. Thus, there is no basis for giving such finding by the doctor and his finding appears to be baseless and unfounded.

19. From perusal of the testimony of the victim, it appears that in her cross-examination she candidly stated that there is dispute between her parents and the accused and the accused has been falsely implicated in this case due to aforesaid dispute. The aforesaid statement of the victim itself indicates animosity between the parties and false implication of the appellant in this case due to the aforesaid animosity.

20. Lakhi Kumari, daughter of Bablu Karmakar with



whom the victim had gone to play at the time of occurrence and was present with her at the time of alleged occurrence has not been examined by the prosecution and no reason has been assigned by the prosecution for her non-examination. Hence, the adverse inference is drawn against the prosecution.

21. In the aforesaid facts and circumstances of the case, I find and hold that prosecution has utterly and miserably failed to substantiate the charges levelled against the appellant beyond all reasonable doubt by adducing consistent, reliable, cogent and trustworthy ocular and documentary evidence. So, the appellant is entitled to get benefit of doubt. Hence, the impugned judgment and order of conviction and sentence passed by the learned lower Court is set aside and the appellant is acquitted from all the charges levelled against him. As the appellant is in custody, he is directed to be released forthwith, if not wanted in any other case.

22. Accordingly, this appeal is allowed.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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